STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 20, 2006
v	No. 261602 Monroe Circuit Court
ANDREW MICHAEL OUELLETTE, Defendant-Appellant.	LC No. 04-033818-FC

Before: Cooper, P.J., and Neff and Borrello, JJ.

PER CURIAM.

Defendant was convicted of receiving, possessing, concealing, or aiding in the concealment of stolen property worth $20,000 or more, MCL 750.535(2)(a). He was sentenced, as a fourth habitual offender, MCL 769.12, to 10 to 25 years in prison for his conviction. He appeals as of right. We affirm.

In early May of 2004, four houses in the Monroe area were broken into, and jewelry was stolen from each. On May 11, 2004, Derek Cole, then manager of Donovan's Pub, a bar connected to the Travel Inn in Monroe,[1] contacted the police because he believed that defendant and his friend Marc Sanders were using counterfeit money in the bar. Cole testified at trial that the police "took them [Sanders and defendant] out of the bar," and added that it later turned out the money was not counterfeit. Detective Mark Spreeman of the Monroe Police Department testified at the preliminary examination that he was investigating the Monroe break-ins and had made it known to other officers and agencies in the area that he was looking for suspects possibly selling jewelry when, on May 12, a fellow officer informed him that two men who had been arrested for possession of a stolen car[2] and were in custody in the county jail were also

[1] Bharti Patel, part owner of the Travel Inn, stated that room 117 of her hotel was registered to Sanders from May 5, 2004, to May 12, 2004, and that she believed a second person was staying there with Sanders because two magnetic keys were given for the room. Mark McNeil, then a desk clerk at the Travel Inn, testified that he checked defendant and Sanders into room 117.

[2] We have reviewed the lower court record thoroughly, and other than this testimony from Officer Spreeman, we have found nothing that explains why defendant had been arrested. There is no indication of whether both defendant and Sanders were in possession of a stolen car, whether they were arrested on an outstanding warrant, or what the facts were that led both

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rumored to have been selling jewelry. Detective Spreeman went to the county jail with a photograph of a shoeprint impression taken at the scene of one of the break-ins, and compared it to the footwear taken from Sanders and defendant at the time of their arrest. Spreeman testified at the preliminary examination that based on similarities between the photographed print and Sanders's shoe,[3] and the Travel Inn hotel keys taken from both suspects when they were taken into custody, he contacted the prosecutor to determine whether a search warrant was needed for the Travel Inn hotel room shared by the suspects. Spreeman testified that the prosecutor informed him it was not required after checkout time on the last day paid for by the room's occupants.

Spreeman and another officer then went to the Travel Inn and waited until checkout time so that defendant and Sanders would no longer have an expectation of privacy in the hotel room, then got Patel's consent and searched room 117. During the search, the officers found some items of jewelry and a pawn slip from a Detroit jewelry store. The items of jewelry were later identified by various victims of the break-ins as property stolen from their homes. Several employees of the hotel and the bar testified that they either saw defendant and Sanders attempting to sell jewelry, or that they were solicited to purchase jewelry themselves. One employee noted that an unidentified patron had told her defendant tried to sell her a 14-karat gold necklace for only $40. Cole and Matthew Bogucki, a Travel Inn employee, searched room 117 after the police searched it. They found some items of jewelry and turned them over to the police; these items were also later identified as stolen in the Monroe break-ins.

Defendant first argues that he was denied a fair trial when the prosecution was allowed to present "overwhelming and confusing evidence" of "other acts" under MRE 404(b). We disagree. This Court reviews a trial court's decision to admit evidence for an abuse of discretion; however, when the trial court's decision involves a preliminary question of law, such as whether a rule of evidence, statute, or constitutional provision precludes the admission of evidence, a de novo standard of review is used. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). When such preliminary questions are at issue, we will find an abuse of discretion when a trial court admits evidence that is inadmissible as a matter of law. *Id*.

MRE 404(b)(1) provides:

(…continued)

defendant and Sanders to be in custody when the hotel room was searched. We inquired during oral argument as to why defendant had been arrested, and received no further explanation. The lack of explanation or further mention of the stolen car referenced by Officer Spreeman gives us pause as to whether defendant's arrest was pretextual. Given that defense counsel did not argue the point and no evidence was presented to rebut the validity of the arrest, our ruling in this matter stands.

[3] Defense counsel objected to this testimony at the preliminary examination, arguing lack of qualification as an expert witness, but the judge ruled that "for purpose of preliminary examination I believe a witness can at least provide testimony of that nature and I think it's – that's really been his response that there were similarities. I don't know if we need to get into much more detail than that."

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

The purpose of the limitation on the admissibility of bad acts evidence is to avoid convicting a defendant based upon his bad character rather than upon evidence that he is guilty beyond a reasonable doubt of the crime charged. *People v Crawford*, 458 Mich 376, 383-384; 582 NW2d 785 (1998); MRE 404(b)(1). If a proper purpose is shown, the "bad acts" evidence will be admissible if the evidence is relevant and has probative value that is not substantially outweighed by unfair prejudice. *Id.* at 385. Further, the trial court may, upon request, provide a limiting instruction to the jury. *Id.*.

Here, the trial court found that the evidence at issue was offered for the proper purpose of establishing knowledge. The admitted "other act" evidence consists of testimony relating to break-ins at the Monroe residences where various pieces of jewelry were stolen, some of which jewelry was found shortly after the break-ins in a hotel room where defendant had been staying. Evidence was presented that defendant sold some of the jewelry that was stolen from these residences to a pawnshop shortly after it was taken from the residences. We conclude that because the "other act" evidence establishes that the jewelry found in the hotel room was stolen, and the jewelry defendant sold to a pawnshop was stolen, the "other act" evidence could establish that defendant had constructive knowledge that the jewelry was stolen, and so was offered for a proper purpose under MRE 404(b). *Crawford, supra*, p 383; MRE 404(b)(1).

The "other act" evidence was also relevant to establish elements of a crime charged against defendant. The fact that the property actually or constructively possessed by a defendant is stolen and the fact that a defendant has knowledge that the property he actually or constructively possessed was stolen are both elements of receiving, possessing, concealing, or aiding in the concealment of stolen property. *People v Gow*, 203 Mich App 94, 96; 512 NW2d 34 (1993). Given the relevance of the evidence in establishing elements of a crime charged, and the fact that the trial court properly gave an instruction that the evidence could not be considered to show bad character or propensity for crime, *Crawford, supra*, p 384, we conclude that the probative value of the evidence was not substantially outweighed by the risk of unfair prejudice. Because the evidence was offered for a proper purpose, was relevant, and had probative value not substantially outweighed by the risk of unfair prejudice, we find that the trial court did not abuse its discretion by allowing the prosecution to introduce the "other acts" evidence. *Id.*

Defendant next argues that the trial court erred when it denied his motion to suppress the fruits of the searches of the hotel room. We disagree. When considering a ruling on a motion to suppress evidence, we review the circuit court's findings of fact for clear error, giving deference to the circuit court's resolution of factual issues. *People v Bolduc*, 263 Mich App 430, 436; 688 NW2d 316 (2004). A finding of fact is clearly erroneous if, after a review of the entire record, we are left with a definite and firm conviction that a mistake has been made, but we may not substitute our judgment for that of the circuit court or make independent findings. *Id.* However, the circuit court's ultimate decision on the motion to suppress is reviewed de novo. *Id.*

"Questions of law relevant to a motion to suppress evidence are reviewed de novo." *People v Hawkins*, 468 Mich 488, 496-497; 668 NW2d 602 (2003).

Generally, materials seized and observations made during an unconstitutional search may not be introduced into evidence. *Hawkins, supra*, pp 498-499. However, "[s]tanding to challenge a search or seizure is not automatic. Rather, a person needs a special interest in the area searched or the article seized." *People v Jordan*, 187 Mich App 582, 589; 468 NW2d 294 (1991). The test is whether a party challenging a search had a reasonable expectation of privacy in the object or area of the intrusion. *Id.* "An expectation of privacy is legitimate if the person had an actual, subjective expectation of privacy and that actual expectation is one that society recognizes as reasonable." *Id*, (citing *People v Perlos*, 436 Mich 305, 317; 462 NW2d 310 (1990)). Generally, an occupant of a hotel or motel room is entitled to the Fourth Amendment protection against unreasonable searches and seizures. *People v Davis*, 442 Mich 1, 10; 497 NW2d 910 (1993). However, even if a hotel guest plans to continue occupying his room, if he has failed to pay the next day's rent, he does not have a legitimate expectation of privacy in the hotel room or in any article therein because his rental period has expired or been lawfully terminated. *U S v Allen*, 106 F3d 695, 699-700 (CA 6, 1997). Furthermore, the protection against unreasonable searches and seizures is not violated when a private person, acting with no knowledge on the part of the police, seizes evidence and voluntarily gives it to the police. *People v Oswald (After Remand)*, 188 Mich App 1, 7; 469 NW2d 306 (1991).

Here, room 117, in which defendant and Marc Sanders stayed, was paid for until noon (checkout time) of May 12, 2004. Bharti Patel, owner of the hotel, told Monroe police officers that neither defendant nor Sanders had a right to room 117 after 12:00 p.m. on May 12, 2004. The officers waited until after 12:00 p.m. on May 12, 2004, and then got Patel's consent to search room 117.[4] The warrantless search of the room was proper because neither defendant nor Sanders had an expectation of privacy in the hotel room at the time it was searched by the police. *Allen, supra*, pp 699-700; *Perlos, supra*, p 317. The subsequent search of the room by Cole and Bogucki, employees of the bar and the hotel, who voluntarily turned over the fruits of their search to the police, was done without the knowledge of the police, so defendant's protection against unreasonable search and seizure was not violated by that search. *Oswald (After Remand), supra*, p 7. Additionally, a limited number of hotel employees were the only people with access to the hotel room after the police conducted their search, and we therefore find that Cole's and Bogucki's subsequent search was not tainted.

For evidence to be admissible it must be relevant and its probative value cannot be substantially outweighed by the danger of unfair prejudice. MRE 401; MRE 403; *People v Taylor*, 252 Mich App 519, 521; 652 NW2d 526 (2002). Here, the fruits of the searches were relevant because the fruits helped establish that defendant constructively possessed items that had been recently stolen. MRE 401; MRE 402. The fact that the property actually or constructively possessed by a defendant is stolen and the fact that a defendant has knowledge

[4] We note for the benefit of similarly situated officers in the future that this procedure comes dangerously close to the line between a valid and an invalid search, but here does not cross it. We further note that it is advisable to stay a bit further back from that line.

that the property he actually or constructively possessed was stolen are both elements of receiving, possessing, concealing, or aiding in the concealment of stolen property. *Gow, supra*, p 96. Since the fruits of the searches establish two elements of a crime charged against defendant, we conclude that the probative value of the fruits of the searches is not substantially outweighed by the risk of unfair prejudice. MRE 403. We find that the trial court did not err when it denied defendant's motion to suppress the fruits of the searches of room 117. *Allen, supra*, pp 699-700; *Perlos, supra*, p 317; *Taylor, supra*, p 521; *Oswald (After Remand), supra*, p 7.

Defendant next argues that the circuit court erred when it denied his motion to quash his second-degree home invasion charge, and that the evidence presented at trial was insufficient to support his conviction for receiving, possessing, concealing, or aiding in the concealment of stolen property worth $20,000 or more. We disagree.

We review a circuit court's decision to grant or deny a motion to quash charges de novo to determine if the district court abused its discretion in binding over defendant for trial. *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002). Furthermore, we review sufficiency of the evidence claims de novo. *Hawkins, supra*, p 457. When reviewing a claim that the evidence was insufficient to support the defendant's conviction, we review the evidence presented in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense. *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993).

A district court must bind over a defendant for trial when the prosecutor presents competent evidence constituting probable cause that a felony was committed and that the defendant committed it. *People v Northey*, 231 Mich App 568, 574; 591 NW2d 227 (1998). Probable cause requires a reasonable belief that the evidence presented at the preliminary examination is consistent with the defendant's guilt. *Id*. at 575. Circumstantial evidence, considered with the inferences arising from it, is sufficient to establish probable cause. *Id*. To bind a defendant over for trial, a district court must find that there is "evidence regarding each element of the crime charged or evidence from which the elements may be inferred." *People v Hudson*, 241 Mich App 268, 278; 615 NW2d 784 (2000) (citation omitted).

The elements of second-degree home invasion are that the defendant (1) entered a dwelling, either by a breaking or without permission, (2) with the intent to commit a felony or a larceny in the dwelling. MCL 750.110a(3); *People v Nutt*, 469 Mich 565, 593; 677 NW2d 1 (2004). Here, it was established at the preliminary examination that a Monroe residence was broken into on May 10, 2004, and that jewelry was stolen from the home. A Monroe officer found a muddy footprint on the back deck of the residence and took a photograph of it; the officer stated that the photographed shoe print was very similar to Sanders's shoeprint. It was established that defendant and Sanders shared a room at the Travel Inn in early May, and that both Sanders and defendant asked various hotel and bar employees and guests if they wanted to buy jewelry. One hotel employee testified that he drove defendant to Detroit, where defendant sold jewelry at a pawnshop. A search of the hotel room by Monroe police officers on May 12, 2004, yielded various jewelry items identified by the homeowners as the jewelry stolen from their residence. Based on all of this evidence, we conclude that the prosecutor presented enough

preliminary examination evidence to lead to the inference that defendant broke and entered the residence with the intent to steal. *Id*. at 593. The district court did not abuse its discretion when it bound defendant over for trial, and the circuit court did not err when it denied defendant's motion to quash defendant's second-degree home invasion charge. *Hudson, supra*, p 278; *Northey, supra*, pp 574-575. We add that in any case, because defendant received a fair trial, there is no redressable error here.

The elements of receiving, possessing, concealing, or aiding in the concealment of stolen property worth $20,000 or more are: (1) that the property was stolen; (2) that the value of the property met the statutory requirement; (3) that the defendant received, possessed, or concealed the property with knowledge that the property was stolen; (4) that the property was previously stolen; and (5) that the defendant had guilty actual or constructive knowledge that the property received or concealed was stolen. MCL 750.535(2)(a); *People v Pratt*, 254 Mich App 425, 427; 656 NW2d 866 (2002). Here, stolen jewelry was found in the hotel room where defendant was staying, and defendant sold stolen jewelry to a pawnshop. The value of the stolen property that was found in the hotel room and that defendant sold was over $20,000. Since the stolen property was found in the hotel room where defendant was staying shortly after it had been stolen, and an unidentified bar patron[5] stated that defendant had tried to sell a 14-karat necklace for only $40, we conclude that a rational trier of fact could infer that defendant had actual or constructive knowledge that the jewelry that he actually or constructively possessed was stolen. Viewing the evidence presented in a light most favorable to the prosecution, a rational trier of fact could have found that the essential elements of receiving, possessing, concealing, or aiding in the concealment of stolen property worth $20,000 or more were proven beyond a reasonable doubt. *Pratt, supra*, p 427; *Warren (After Remand), supra*, p 588. Sufficient evidence was presented to support defendant's receiving, possessing, concealing, or aiding in the concealment of stolen property worth $20,000 or more conviction. *Johnson, supra*, p 723.

Defendant's final issue on appeal is that he was denied his right to a fair and impartial trial through misconduct of the prosecutor. We disagree.

Defendant objected to the prosecutor's question to McNeil regarding whether defendant ever asked him for a ride to "do break-ins, or anything like that." Defendant also objected to Gaytona Sennett's elicited testimony regarding an incident about defendant allegedly stealing a car. Finally, defendant objected to the prosecutor's attempt to elicit testimony from Sennett regarding what an unidentified bar patron told her regarding defendant selling a necklace. Therefore, defendant has properly preserved his prosecutorial misconduct claims. *People v Nimeth*, 236 Mich App 616, 625; 601 NW2d 393 (1999). However, defendant failed to object to the prosecutor eliciting testimony from Cole regarding a handgun he found in a hotel room, and thus, defendant failed to preserve his final claim of prosecutorial misconduct. *Id*.

Preserved claims of prosecutorial misconduct are evaluated on a case-by-case basis to determine whether the defendant was denied a fair and impartial trial. *People v Rice (On*

[5] Evidence was presented that defendant and Sanders had attempted to sell jewelry in the bar connected to the hotel where they were staying.

Remand), 235 Mich App 429, 435; 597 NW2d 843 (1999). Unpreserved claims of prosecutorial misconduct are reviewed for a plain error which affected the defendant's substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). Reversal of unpreserved claims is merited only if plain error caused the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings regardless of the defendant's innocence. *Id*.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *Rice (On Remand), supra*, p 438. An attorney may not knowingly offer or attempt to elicit inadmissible evidence. *People v Dyer*, 425 Mich 572, 576; 390 NW2d 645 (1986).

Defendant's argument that the prosecutor's question to McNeil regarding whether defendant ever asked McNeil for a ride to "do break-ins, or anything like that," denied defendant of his right to a fair and impartial trial fails. Here, the trial judge previously ruled that the prosecutor could not elicit testimony from McNeil regarding what Sanders asked him because what Sanders asked McNeil was hearsay and the co-conspirator hearsay exception was not met. However, the trial judge did not rule that the prosecutor could not elicit testimony from McNeil regarding what defendant asked him. Defendant's statements/questions to McNeil would not be considered hearsay because they would most likely be considered an admission by a party opponent. See, MRE 801(d)(2). Therefore, the prosecutor's question to McNeil did not attempt to elicit inadmissible hearsay evidence. MRE 801(d)(2). In any case, McNeil answered the question in the negative, so the prosecutor's question did not deny defendant his right to a fair and impartial trial, and did not amount to prosecutorial misconduct. *Watson, supra*, p 586.

Defendant's argument that he was denied his right to a fair and impartial trial when the prosecutor asked a question that elicited a response that defendant had previously stolen a car fails. The prosecutor asked Sennett, an employee of the bar, "[w]hat did [defendant] tell you he had for sale then?" Sennett responded, "he never told me that he had anything for sale. He just told me that he had stolen a car." We conclude that the prosecutor's question was asked in an attempt to determine whether defendant had directly asked Sennett whether she wanted to buy jewelry; it was not an attempt to elicit testimony about a stolen car. Our conclusion is supported by the fact that Sennett had previously testified that defendant was asking bar patrons whether they wanted to buy jewelry. The response about the stolen car was successfully objected to, and the trial judge immediately instructed the jury to disregard the response. We find that the prosecutor's question did not deny defendant of his right to a fair and impartial trial, and did not amount to prosecutorial misconduct. *Watson, supra*, p 586.

Defendant's argument that he was denied his right to a fair and impartial trial when the prosecutor attempted to elicit testimony from Sennett about what an unidentified patron told her about defendant trying to sell a necklace fails. Before the prosecutor attempted to elicit testimony from Sennett regarding the unidentified patron's statement to her about defendant trying to sell a necklace, the prosecutor asked the judge to make a hearsay ruling on the statement. The trial judge ruled that the patron's statement to Sennett was admissible evidence because it fell under the present sense impression hearsay exception. When the prosecutor subsequently elicited testimony about the patron's statement, the prosecutor was not attempting

to elicit inadmissible evidence. We find that the prosecutor's question did not deny defendant of his right to a fair and impartial trial, and did not amount to prosecutorial misconduct. *Watson, supra*, p 586.

Finally, defendant's argument that he was denied his right to a fair and impartial trial when the prosecutor elicited testimony from Cole regarding a handgun he found in an unidentified hotel room fails. Here, the prosecutor asked Cole to tell him about an occasion when he found something in a hotel room. Cole responded, "[t]he first big item that we found was a loaded handgun," to which the prosecutor quickly responded, "I'm sorry, that's not where I meant to go . . . [w]hat I meant to ask you about was was there ever an occasion where maybe some jewelry-type items were found and the police were called?" Defendant did not object. We conclude that the prosecutor's question was asked in an attempt to get Cole to testify to the jewelry Cole found in the hotel room where defendant was staying. Our conclusion is supported by the prosecutor's immediate response to Cole's mention of the gun, and the fact that Cole and Bogucki did search the room defendant was staying in and found jewelry in the tissue box. Therefore, the prosecutor's question did not deny defendant his right to a fair and impartial trial, let alone amount to plain error which affected defendant's substantial rights, and thus, did not amount to prosecutorial misconduct. *Thomas, supra*, p 453-454; *Watson, supra*, p 586.

Affirmed.

/s/ Jessica R. Cooper
/s/ Janet T. Neff
/s/ Stephen L. Borrello